# Dato' Abdullah bin Ahmad v Syarikat Permodalan Kebangsaan Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-774-89
NH CHAN J
11 NOVEMBER 1989

*Contract — Employment contract — Whether wrongful repudiation by one party results in automatic discharge of contract — Whether repudiation must be accepted for discharge — Granting of injunction to restrain implied negative undertaking — Whether specific performance can be granted to contracts for personal services — Specific Relief Act 1950, ss 20(1)(b), 54(f) & 55*

By a contract of employment the plaintiff was employed by the first defendant to serve the first defendant as its executive chairman and managing director for a period of three years from 1 January 1989 to 31 December 1991. At a board meeting on 2 October 1989, the plaintiff was removed as chairman of the company and the second defendant was appointed chairman of the company in his place. At the same board meeting, the plaintiff was suspended of his executive powers and duties. The remaining defendants were members of the board. The executive powers and duties of the plaintif as chairman and managing director of the defendant company were contained in the contract of employment.

The plaintiff obtained injunctions (1) against the defendant company to restrain the defendant company from removing the plaintiff as chairman and managing director, and from preventing the plaintiff from exercising the powers and duties of the holders of such office, and (2) to restrain the second defendant from exercising the powers and duties of the office of chairman of the first defendant company.

**Held**, allowing the defendants' application in part:

(1) In contract law, if one party wrongfully repudiates the contract, the contract will not automatically come to an end unless the repudiation is accepted by the innocent party. Contracts of employment are no exception to the general rule that repudiation does not terminate the contract until accepted. Section 55 of the Specific Relief Act 1950 ('the Act') provides that where a contract contains both a negative as well as a positive undertaking, even though the courts are unable to grant specific performance of the positive undertaking, an injunction to perform the negative undertaking may be granted. Although the court could restrain the servant from committing a breach of an express or implied negative undertaking, this right to apply for an injunction is subject to the proviso which is that the applicant himself has not failed to perform his obligations under the contract. The existence of the proviso clearly contemplates that the contract is subsisting until repudiation is accepted.

(2) Contracts for personal services cannot be specifically enforced under s 20(1)(b) of the Act. Further, s 54(f) of the Act provides that an injunction cannot be granted to prevent a breach of a contract the performance of which would not be specifically enforced. The reason is if one party has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster.

(3) It appears that in English law no injunction could be granted in the absence of any express negative stipulation to that effect. However there is statutory provision in s 55 of the Act for an injunction to be issued on an implied negative stipulation in the contract.

(4) In the instant case, the removal from office of the plaintiff as chairman of the company and the suspension of his executive powers did not put an immediate end to the contract of service. This operates as a repudiation of the contract by the defendant company. It will result in the determination of the contract only when the repudiation is accepted by the plaintiff. The repudiation has not been accepted by the plaintiff and the contract of employment is still in force.

(5) Although the contract has not been discharged and therefore is still continuing because the repudiation has not been accepted by the plaintiff, it is however, a contract of personal service and the plaintiff is not entitled to a decree of specific performance to compel the defendant company to employ him as the executive chairman and managing director of the company.

(6) Although specific performance is not possible, the plaintiff is not prevented from applying for an injunction to enforce performance of the express or implied negative undertaking in the agreement. There is on the part of the defendant company an implied negative agreement not to appoint someone else as chairman until the expiration of the plaintiff's period of employment on 31 December 1991.

**[Bahasa Malaysia summary**

Mengikut satu kontrak pekerjaan, plaintif telah digaji oleh defendan pertama untuk berkhidmat untuk defendan pertama sebagai pengerusi eksekutif dan pengarah urusan bagi tempoh tiga tahun dari 1 Januari 1989 hingga 31 Disember 1991. Di mesyuarat lembaga pada 2 Oktober 1989, plaintif telah dilucut jawatannya sebagai pengerusi syarikat itu dan defendan kedua dilantik sebagai pengerusi mengambil tempatnya. Di mesyuarat lembaga yang sama, plaintif telah digantung semua tugas dan kuasa eksekutifnya. Defendan-defendan yang lain adalah ahli-ahli lembaga itu. Tugas dan kuasa eksekutif plaintif sebagai pengerusi dan pengarah urusan syarikat defendan terkandung di dalam kontrak pekerjaannya.

Plaintif memperolehi injunksi-injunksi (1) terhadap syarikat defendan untuk menyekatnya daripada melucutkan jawatan plaintif sebagai pengerusi dan pengarah urusan, dan daripada menghalang plaintif daripada menjalankan kuasa dan tugas pemegang jawatan-jawatan tersebut, dan (2) untuk menyekat defendan kedua daripada menjalankan tugas dan kuasa jawatan pengerusi syarikat defendan itu.

**Diputuskan**, meluluskan sebahagian permohonan defendan:

(1) Dalam undang-undang kontrak, jika satu pihak menolak sesuatu kontrak secara salah, kontrak itu tidak berakhir secara automatis melainkan penolakan itu diterima oleh pihak yang tidak bersalah. Kontrak pekerjaan tidak terkecuali daripada peraturan am bahawa penolakan tidak mengakhiri sesuatu kontrak sehingga diterima. Seksyen 55 Akta Relif Tertentu 1950 ('Akta itu') memperuntukkan bahawa bila sesuatu kontrak mengandungi kedua-dua jaminan positif dan negatif, meskipun mahkamah tidak dapat memberikan perlaksanaan spesifik jaminan positif itu, satu injunksi untuk melaksanakan jaminan negatif itu boleh diberikan. Walaupun mahkamah boleh menyekat seorang penjawat daripada menolak satu jaminan negatif yang nyata atau secara implikasi, hak untuk memohon untuk injunksi tertakluk kepada proviso bahawa pemohon sendiri tidak gagal menunaikan kewajipannya di bawah kontrak itu. Wujudnya proviso itu menunjukkan dengan jelas bahawa kontrak itu masih berterusan sehingga penolakan itu diterima.

(2) Kontrak bagi perkhidmatan peribadi tidak boleh dilaksanakan secara spesifik di bawah s 20(1)(b) Akta itu. Seterusnya, s 54(f) Akta itu memperuntukkan bahawa injunksi tidak boleh

diberikan untuk menahan penolakan sesuatu kontrak yang tidak boleh dilaksanakan secara spesifik. Sebabnya ialah jika satu pihak tidak mempercayai kejujuran dan ketulusan atau ketaatan pihak yang lain, tentulah bencana akan berlaku jika satu pihak dipaksa untuk berkhidmat untuk pihak yang lain itu.

(3) Nampaknya di dalam undang-undang Inggeris, injunksi tidak boleh diberikan jika tiada sebarang peruntukan negatif nyata bagi tujuan itu. Namun begitu, terdapat peruntukan statutori dalam s 55 Akta itu yang membolehkan satu injunksi dikeluarkan ke atas satu peruntukan negatif secara implikasi dalam kontrak itu.

(4) Dalam kes ini, perlucutan jawatan plaintif sebagai pengerusi syarikat itu dan penggantungan kuasa eksekutifnya tidak mengakhiri kontrak perkhidmatan dengan serta-merta. Ini bertindak sebagai penolakan kontrak itu oleh syarikat defendan. Ini akan mengakhiri kontrak itu hanya bila penolakan itu diterima oleh plaintif. Penolakan itu belum diterima oleh plaintif dan kontrak pekerjaan itu masih berkuatkuasa.

(5) Walaupun kontrak itu belum ditamatkan dan lantaran itu masih berterusan kerana penolakan itu belum diterima oleh plaintif, ianya walaubagaimanapun adalah satu kontrak untuk perkhidmatan peribadi dan plaintif tidak berhak mendapat perlaksanaan spesifik untuk memaksa syarikat defendan menggajinya sebagai pengerusi eksekutif dan pengarah urusan syarikat itu.

(6) Walaupun perlaksanaan spesifik tidak boleh diberikan, plaintif tidak disekat daripada memohon untuk injunksi bagi melaksanakan secara spesifik jaminan negatif nyata atau secara implikasi dalam kontrak itu. Syarikat defendan tertakluk kepada satu jaminan negatif secara implikasi supaya tidak melantik orang lain sebagai pengerusi sehingga luputnya tempoh pekerjaan plaintif pada 31 Disember 1991.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-141 of 1990.]

**Cases referred to**

1 *Heyman* v *Darwins Ltd* [1942] AC 356 (refd)
2 *Denmark Productions Ltd* v *Boscobel Productions Ltd* [1969] 1 QB 699 (refd)
3 *Gunton* v *Richmond-upon-Thames London Borough Council* [1980] 3 WLR 714 (folld)
4 *Thomas Marshall Ltd* v *Guinle* [1979] 1 Ch 227 (folld)
5 *Boston Deep Sea Fishing and Ice Co* v *Ansell* (1888) 39 Ch D 339 (refd)
6 *Francis* v *Municipal Councillors of Kuala Lumpur* [1962] 1 WLR 1411 (distd)
7 *Hill* v *(CA) Parsons & Co Ltd* [1972] 1 Ch 305 (refd)
8 *Vine* v *National Dock Labour Board* [1957] AC 488 (refd)
9 *Decro-Wall International SA* v *Practitioners in Marketing Ltd* [1971] 1 WLR 361 (refd)
10 *Sanders* v *Ernest A Neale Ltd* [1974] ICR 565; [1974] 3 All ER 327 (refd)
11 *Lumley* v *Wagner* (1852) 1 De GM & G 604 (refd)
12 *William Robinson & Co Ltd* v *Heuer* [1898] 2 Ch 451 (refd)
13 *Warner Brothers Pictures Incorporated* v *Nelson* [1937] 1 KB 209 (refd)
14 *Ehrman* v *Bartholomew* [1898] 1 Ch 671 (refd)
15 *Howard* v *Pickford Tool Co Ltd* [1951] 1 KB 417 (folld)
16 *Chappell* v *Times Newspapers Ltd* [1975] 1 WLR 482 (refd)
17 *Pertama Cabaret Nite Club Sdn Bhd* v *Roman Tam* [1981] 1 MLJ 149 (refd)
18 *Whitwood Chemical Co* v *Hardman* [1891] 2 Ch 416 (refd)
19 *Mortimer* v *Beckett* [1920] 1 Ch 571 (refd)
20 *Hivac* v *Park Royal Scientific Instruments* [1946] Ch 169 (refd)
21 *Broom (Selangor) Rubber Plantations* v *RH Whitley* [1919] 1 FMSLR 365 (folld)

**Legislation referred to**

Contracts Act 1950 s 40
Specific Relief Act 1950 ss 20(1)(b), 54(f), 55

*Dominic Puthucheary* (*PS Ranjan* with him) for the plaintiff.
*KS Narayanan* for the second, third and fourth defendants.

*Cur Adv Vult*

**NH Chan J**: The facts can be shortly stated. By a contract of employment, the plaintiff, Dato' Abdullah bin Ahmad, is employed by the first defendant company, Syarikat Permodalan Kebangsaan Bhd to serve the company as its executive chairman and managing director for a period of three years from 1 January 1989 to 31 December 1991. At a board meeting on 2 October 1989, the plaintiff was removed as chairman of the company and the second defendant, Dato' HM Shah, was appointed chairman of the company in his place. At the same board meeting, the plaintiff was suspended of his executive powers and duties. The third to the sixth defendants were members of the board.

The executive powers and duties of the plaintiff as chairman and managing director of the defendant company are contained in cl 2 of the contract of employment.

In contract law, if one party wrongfully repudiates the contract, the contract will not automatically come to an end unless the repudiation is accepted by the innocent party. The innocent party is presented with an option. He may either accept the repudiation (in which case the contract is treated as discharged or terminated) or he may refuse to accept the breach as a discharge of the contract (in such a case the contract is still in force). Put 'more precisely, he may either affirm the contract by treating it as still in force, or on the other hand he may treat it as finally and conclusively discharged.': *Cheshire and Fifoot's Law of Contract* (10th Ed, 1981) at p 489.

As Viscount Simon LC said in *Heyman* v *Darwins Ltd*[1] at p 361:

> But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.

As Winn LJ said in *Denmark Productions Ltd* v *Boscobel Productions Ltd*[2] at p 731:

> It seems to me that the process of ending or indeed of varying a contract by repudiation is the converse of that of making the same contract; each process operates by offer and acceptance, or their equivalents; each is essentially bilateral. Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat

> the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to 'accept the repudiation'.

'The principle was recognized 100 years ago in such cases as *Hochster* v *De La Tour* (1853) 2 E & B 678 and *Johnstone* v *Milling* (1886) 16 QBD 460.', said Buckley LJ in *Gunton* v *Richmond-upon-Thames London Borough Council*[3] at p 729. In this country, the principle is embodied in s 40 of the Contracts Act 1950.

Contracts of employment are no exception to the general rule (which is a statutory rule in this country) that repudiation does not terminate the contract until accepted: see *Thomas Marshall Ltd* v *Guinle*[4] and *Gunton* v *Richmond-upon-Thames London Borough Council*.[3] And termination of the contract occurs not on the date when the repudiatory act is done, but 'from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of the contract.': per Bowen LJ in *Boston Deep Sea Fishing and Ice Co* v *Ansell*[5] at p 365.

The Privy Council case of *Francis* v *Municipal Councillors of Kuala Lumpur*[6] must be viewed in its proper perspective. I think Buckley LJ (in *Gunton* v *Richmond Borough Council*[3] (CA)) has put it much better than I could. He said, at p 728:

> *Francis* v *Kuala Lumpur Councillors* [1962] 1 WLR 1411 [is a case] in which a de facto, but ultra vires, dismissal was held to give rise only to a liability in damages for wrongful dismissal. It is worthy of note that in [that] case ... no reference is made to the plaintiff having accepted a repudiation by the defendant municipality of his contract of service. If, however, a dismissed servant sues for damages for wrongful dismissal, he must by so doing accept the master's repudiation of the contract.

At one time it was thought that the rule, that a contract was not determined by the wrongful repudiation of it by one party without the innocent party accepting it, did not apply to contracts of employment.

In *Hill* v *(CA) Parsons & Co Ltd*,[7] Lord Denning MR said, at p 313, that 'a notice which is too short does not terminate a contract of employment', but he went on to say, at p 314, that if 'the master insists on the employment terminating on the named day... In the ordinary course of things, the relationship of master and servant thereupon comes to an end.' He referred to this passage by Viscount Kilmuir LC in *Vine* v *National Dock Labour Board*[8] at p 500 where the Lord Chancellor said that in the ordinary master and servant case 'if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract.'

In *Denmark Productions Ltd* v *Boscobel Productions Ltd*,[2] both Salmon and Harman LJJ observed at pp 726 and 737 that if a servant employed under a contract of personal service was wrongfully dismissed, he could not treat the contract as still subsisting. On the other hand, there are dicta in *Decro-Wall International SA* v *Practitioners in Marketing Ltd*[9] which doubted whether this view is correct. Salmon LJ said (at p 370): 'I doubt whether, in law, a contract of service can be unilaterally determined by the master's breach.' Similar views were expressed by Sachs LJ at pp 375-376.

In *Sanders* v *Ernest A Neale Ltd*[10] at p 571, Sir John Donaldson P said:

> ... the repudiation of a contract of employment is an exception to the general rule. It terminates the contract without the necessity for acceptance by the injured party.

The argument in support of the direction set by Viscount Kilmuir LC that contracts of employment are an exception to the general rule for repudiation, in that they are terminated by the repudiation without the necessity for acceptance by the innocent party, can be summarized as follows:

(i) The starting point is the dictum of Viscount Kilmuir LC in *Vine* v *National Dock Labour Board*[8] at p 500.

(ii) The dicta of Salmon and Harman LJJ in *Denmark Productions Ltd* v *Boscobel Productions Ltd*[2] at pp 726 and 737. (On the other hand, there are contrary dicta in *Decro-Wall International SA* v *Practitioners in Marketing Ltd*[9] at pp 370, 375 and 376).

(iii) That part of the judgment of Lord Denning MR in *Hill* v *(CA) Parsons & Co Ltd*[7] at p 314 which followed the dictum of Viscount Kilmuir LC in *Vine* v *National Dock Labour Board*[8] at p 500. (But Sachs LJ (at pp 318-319) rejected the argument that a wrongful repudiation of a contract of service terminated the contract without the innocent party accepting it. Stamp LJ (at p 321) assumed, without expressing an opinion, that the contract of service still subsisted, the servant not having accepted the repudiation.)

(iv) *Sanders* v *Ernest A Neal Ltd*[10] which held that wrongful dismissal terminates the contract of employment and only in very exceptional cases could the contract continue to exist.

*Sanders* v *Ernest A Neal Ltd*[10] represents the high-water mark of what may be called the doctrine of unilateral determination. Then came the two decisions, the first in 1979 and the other in 1980, which turned the tide. In *Thomas Marshall Ltd* v *Guinle*,[4] Sir Robert Megarry V-C (after a detailed examination of the authorities that I have mentioned above and which have been relied on in support of unilateral determination) held that contracts of employment are no exception to the general rule that repudiation does not terminate the contract until accepted. This is what he said, at p 239:

> At least one thing is plain, and that is that the authorities on the point are in a far from satisfactory state. Let me say at the outset that I have great difficulty in accepting the view that contracts of employment are an exception to the general rule

for repudiation, and that they are terminated forthwith by the repudiation, whether or not the innocent party elects to accept it as doing this. Indeed, Mr Hutchison was unable to contend that such a doctrine was right ... Let me attempt to summarize the matter.

First, there will usually be a wide range of acts and omissions which will constitute a repudiation of a contract, whether for service or otherwise. In addition to an outright refusal to perform the contract, there are many other acts and omissions which can amount to a repudiation which will entitle the innocent party to treat the contract as being at an end. Such acts or omissions may consist either of a fundamental breach of the contract or the breach of a fundamental term of it: I adopt the distinction made by Lord Upjohn in *Suisse Atlantique Societe d'Armement Maritime SA* v *NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 421, 422. If cases of master and servant are an exception from the rule that an unaccepted repudiation works no determination of the contract, and instead are subject to what I have called the doctrine of automatic determination, the result would be that many a contract of employment would be determined forthwith upon the commission of a fundamental breach, or a breach of a fundamental term, even though the commission of this breach was unknown to the innocent party, and even if, had he known, he would have elected to keep the contract in being.

That would indeed be a remarkable result.

And at p 240, he went on to say:

Second, it is difficult, if not impossible, to reconcile the doctrine of automatic determination with a number of authorities which, for the most part, do not appear to have been cited in any of the [automatic determination] cases that I have mentioned.

The Vice-Chancellor then went on to refer to *Lumley* v *Wagner*,[11] *William Robinson & Co Ltd* v *Heuer*,[12] *Warner Brothers Pictures Incorporated* v *Nelson*[13] and *Ehrman* v *Bartholomew*.[14] And he said, at p 241:

Apart from the citation of *Lumley* v *Wagner* in *Hill* v *(CA) Parsons & Co Ltd* [1972] Ch 305 (see pp 315, 322, 324), none of these authorities seem to have been considered in any of the recent cases on automatic determination that I have mentioned. Yet if the doctrine of automatic determination is good law, all that Johanna Wagner, Heuer and Bette Davis had to do was to say that their contracts were at an end, and so they were free from the contractual restrictions that applied while their employment continued. The claims to an injunction would thus have failed instead of succeeding. Sir William Jowitt KC and Mr JD Cassels KC who appeared for Bette Davis, ought to have won instead of losing. Nor need the wine traveller [in *Ehrman* v *Bartholomew*] have had to base his contentions on the width of the retrictions.

And finally, Sir Robert Megarry V-C in his judgment referred to *Howard* v *Pickford Tool Co Ltd*[15] which was clearly a master and servant case. The Vice-Chancellor said, at p 242:

There is one other case that I should refer to, although it was not mentioned in argument. That is *Howard* v *Pickford Tool Co Ltd* [1951] 1 KB 417. This was cited in *Hill* v *(CA) Parsons & Co Ltd* [1972] Ch 305 (though only in argument), but was not cited in any of the other automatic determination cases. There, a company contracted to employ the plaintiff as managing director for six years. Within six months the plaintiff, while continuing to act as managing director, brought proceedings against the company. In these, he claimed that the conduct of the chairman was such as to show that the company no longer intended to be bound by the contract; and he sought a declaration that the company had repudiated the contract, and that it no longer bound him. On the ... doctrine of automatic determination, the chairman's conduct, if established, determined the contract. ... What happened in fact was that the Court of Appeal struck out the statement of claim. At p 421 Sir Raymond Evershed MR said that as the plaintiff had not accepted the repudiation but had gone on performing his part of the contract, 'the alleged act of repudiation is wholly nugatory and ineffective in law.' On the same page Asquith LJ said that 'an unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind.' It seems to me to be quite impossible to add the gloss 'except in master and servant cases, where an unaccepted repudiation is etched in granite and is beautiful to the repudiator': for the case was itself a master and servant case. Yet some gloss of this sort seems to be required if any doctrine of automatic determination is good law.

The Vice-Chancellor then concluded thus (at pp 242-243):

Quite apart from that case, there is the question whether I am required to treat the *Lumley* v *Wagner* line of authorities, which include a decision of the Court of Appeal, as having been overturned sub silentio in the automatic determination cases. I do not think that I can be. Those [automatic determination] cases speak in a voice which is far from clear; and of the conflicting dicta, there seems to me to be great force in what was said in the *Decro-Wall* case, and by Sachs LJ in *Hill* v *(CA) Parsons & Co Ltd*. I can see no ratio decidendi in any of the automatic determination cases which is necessarily inconsistent with the ratio decidendi in any of the *Lumley* v *Wagner* line of cases. Further, none of the automatic determination cases have had to deal with the question whether, by unilaterally refusing to serve, the servant can thereby release himself not merely from any further obligation to serve but also from any restrictions, whether imposed by his contract or implied by law, which apply only while the contract of service exists. Furthermore, I think the courts must beware of allowing a restriction of the range of remedies which it is proper to grant to destroy or unduly impair the rights of the parties.

Above all, I think the courts must be astute to prevent a wrongdoer from profiting too greatly from his wrong. If without just cause a servant who has contracted to serve for a term of years refuses to do so, it is easy to see that the court is powerless to make him do what he has contracted to do: neither by decreeing specific performance nor by granting an injunction can the court make the servant perform loyally what he is refusing to do, however wrongfully. If such an order were to be made, the ultimate sanction for disobedience is committal to prison; and this, far from forcing the servant to work for his master, would effectively stop him from doing this. But why should the court's inability to make a servant work for his employer mean that as soon as the servant refuses to do so the court is forthwith disabled from restraining him from committing any breach, however flagrant, of his other obligations during the period of his contract? I would wholly reject the doctrine of automatic determination....

In *Gunton* v *Richmond-upon-Thames London Borough Council*,[3] the same view as that of Megarry V-C (in *Thomas Marshall Ltd* v *Guinle*[4]) was taken by the majority of the Court of Appeal.

As against *Sanders* v *Ernest A Neale Ltd*,[10] so there are now two decisions which have held that a contract of personal service was no exception to the general rule that repudiation did not automatically discharge the contract. In my judgment, I take the same view and I endorse the judgment of Sir Robert Megarry V-C in *Thomas Marshall Ltd* v *Guinle*[4] which is also the same view taken by the majority in *Gunton* v *Richmond Borough Council (CA)*.[3]

However, contracts of personal service have some special features. Section 20(1)(b) of the Specific Relief Act 1950 ('the Act') clearly points out that such contracts cannot be specifically enforced. Section 54(f) of the Act further provides that 'An injunction cannot be granted — ... (f) to prevent the breach of a contract the performance of which would not be specifically enforced.' This is similar to the position in English law where the general rule is that the courts will not enforce, 'either by specific performance or by injunction, a contract for services, either at the behest of the employers or of the employee. The reason is obvious: if one party has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster.': see per Geoffrey Lane LJ in *Chappell* v *Times Newspapers Ltd*[16] at p 506. See also Megarry J, at first instance, in the same case, at p 492; thus:

> The basic reason for [refusal] ... is that the relationship between employer and employee is one of confidence, and the courts ought not to seek to prolong the relationship by an injunction or a decree of specific performance when that confidence no longer exists. If the employer does not want to employ the employee, or the employee does not want to work for the employer, you cannot by order of the court satisfactorily make them do what one of them does not want to do.

On the other hand, s 55 of the Act provides that where a contract contains both a negative as well as a positive undertaking, even though the courts are unable to grant specific performance of the positive undertaking, an injunction to perform the negative undertaking may be granted: see *Law of Contract in Malaysia and Singapore* by Visu Sinnadurai (2nd Ed, 1987) at p 819. This is what s 55 says:

> Notwithstanding section 54(f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, *express or implied*, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:
>
> Provided that the applicant has not failed to perform the contract so far as it is binding on him. (The emphasis is mine.)

Take, first, the case of a servant who refuses to serve his employer although he has contracted to do so for a period. Although the repudiation by the servant does not determine the contract if it has not been accepted by the employer, yet, the court is powerless to force the servant to work for his employer in accordance with what he has contracted to do. In this country, that that is so is because of ss 20(1)(b) and 54(f) of the Act. Actually, it is easy to see the reason why that is so. The words of Sir Robert Megarry V-C in *Thomas Marshall Ltd* v *Guinle*[4] at p 243 is apt:

> If without just cause a servant who has contracted to serve for a term of years refuses to do so, it is easy to see that the court is powerless to make him do what he has contracted to do: neither by decreeing specific performance nor by granting an injunction can the court make the servant perform loyally what he is refusing to do, however wrongfully. If such an order were to be made, the ultimate sanction for disobedience is committal to prison; and this, far from forcing the servant to work for his master, would effectively stop him from doing this.

Although the court is unable to order specific performance, but because the contract of employment is still in being (as the repudiation of the servant in refusing to work has not been accepted by the employer), the court could restrain the servant from committing a breach of an express or implied negative undertaking. In this country, that that is so is because of s 55 of the Act. However, this right to apply for an injunction is subject to the proviso in the section which is that the applicant himself has not failed to perform his obligations under the contract. The existence of the proviso in our law clearly contemplates that the contract is subsisting. Otherwise, if it were the law that the contract could be terminated merely by the repudiation of one party without acceptance by the other, then, because the contract had come to an end, there would not remain obligations under the contract to be performed. Such a result would certainly make the proviso unnecessary.

The following cases fall under illustration (c) to s 55 of the Act as they are cases where there was an express negative undertaking in the contract of employment. The illustration reads:

> A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

In *Lumley* v *Wagner*,[11] there was a negative agreement on the part of Johanna Wagner not to sing for anyone else during the period she had contracted to sing for Benjamin Lumley. In *William Robinson & Co* v *Heuer*,[12] Heuer agreed to devote his whole time to the plaintiff company and not during his engagement to engage in any business relating to goods of any description sold or made by the company. In *Warner Brothers Pictures Incorporated* v *Nelson*,[13] Bette Davis entered into a contract with the plaintiff film company for a period as a film actress, and not during that

period to render any services for any other motion picture or stage production or business. See also *Pertama Cabaret Night Club Sdn Bhd* v *Roman Tam*.[17]

All these are examples of cases which fall within illustration (c) of s 55. All these are cases where there was an express negative undertaking in their contracts.

In all these cases, the refusal of Johanna Wagner, Heuer, Bette Davis and Roman Tam to work for their employers did not put an end to their contracts. As said by Megarry V-C in *Thomas Marshall Ltd* v *Guinle*,[4] at p 241:

> ... if the doctrine of automatic determination is good law, all that Johanna Wagner, Heuer and Bette Davis had to do was to say that their contracts were at an end, and so they were free from the contractual restrictions that applied while their employment continued. The claims to an injunction would thus have failed instead of succeeding. Sir William Jowitt KC and Mr JD Cassels KC who appeared for Bette Davis, ought to have won instead of losing.

But if those contracts were not to be treated as at an end, and even though the courts were powerless to force Johanna Wagner, Heuer, Bette Davis and Roman Tam to work in accordance with their contracts, an injunction to perform the negative undertaking could be granted (in fact it was so granted in those cases), provided that the applicants/employers have not failed to perform their obligations under the contract.

This is how the general rule was put by Winn LJ in *Denmark Productions Ltd* v *Boscobel Productions Ltd*,[2] at pp 731-732:

> Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to 'accept the repudiation' and is thereupon entitled (a) to sue for damges in respect of any earlier breach committed by A and for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further.
>
> On the other hand, if B elects in such a situation, or is taken by reason of silence to have elected, not to treat the contract as at an end, he may require A to perform any contractual obligations as they fall due in the future (provided that he himself performs any simultaneous or precedent obligation), including, as a particular example, the making of payments for which the contract provides.

However, in the case of contracts of personal service specific performance is not possible, so that there is no question of B requiring A to perform any positive (as opposed to negative) contractual obligations as they fall due. But the proviso that B himself performs his obligations under the contract still remains in force if he elects not to treat the contract as at an end. So that, if Johanna Wagner, Heuer, Bette Davis and Roman Tam were to return to work their employers must pay them their salary or remuneration; their contract being still in force.

On the other hand, if they refused to work or serve their employees, there would be no obligation on the part of their employers to pay them. This is 'because the right to receive remuneration and the obligation to render services are mutually interdependent': see per Buckley LJ in *Gunton* v *Richmond Borough Council*,[3] at p 730.

Illustration (d) to s 55 of the Act is an example of a situation where there is an implied negative agreement or undertaking. It says:

> B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.

It appears that in English law no injunction could be granted in the absence of any express negative stipulation to that effect: see *Whitwood Chemical Co* v *Hardman*;[18] *Mortimer* v *Beckett*.[19] An apparent departure may be observed in *Hivac* v *Park Royal Scientific Instruments*[20] and *Thomas Marshall Ltd* v *Guinle*,[4] but the injunctions were there issued to restrain breach of a duty imposed by law rather than to restrain breach of an implied negative promise.

In this country, on the other hand, there is statutory provision in s 55 for an injunction to be issued on an implied negative stipulation on the contract. An example of such an implied negative agreement is to be found in *Broom (Selangor) Rubber Plantations* v *RH Whitley*.[21] In that case, the defendant, Whitley, entered into an agreement to serve the plaintiffs as an assistant on their rubber estate for a period of three years and eight months. Whitley unilaterally terminates the employment saying that he had been offered a much better position. The plaintiff sued for an injunction and the judgment reads:

> The plaintiffs have performed the contract so far as it is binding on them. The defendant threatens to break his affirmative agreement with them. I find that there is on the part of the defendant an implied negative agreement, viz not to enter the service of any other employer until the expiration of his period of service with the plaintiffs on 31 October 1920.

Although the court was powerless to compel the defendant to serve his employers, an injunction was granted to restrain him from working with someone else until the expiration of his period of service with the plaintiffs.

Take, next, the case of the wrongful dismissal of a servant. This does not put an immediate end to the contract of service. It operates as a repudiation of the contract by the employer which results in termination of the contract only when that repudiation is accepted by the servant. Wrongful dismissal involves a breach by the employer of his obligation to continue to employ the servant. In contracts of personal service, specific performance is not possible, so that there is no question of the servant requiring the employer by court order to perform his positive obligation to continue to employ the servant: see ss 20(1)(b) and 54(f)

of the Act. Actually, it is easy to see the reason for this. This is how Megarry J put it in *Chappell* v *Times Newspapers Ltd*[16] at p 492:

> ... the general rule is that an injunction will not be granted to restrain an employer from terminating a contract of employment. ... The basic reason for refusing an injunction is that the relationship between employer and employee is one of confidence, and the courts ought not to seek to prolong the relationship by an injunction or a decree of specific performance when that confidence no longer exists. If the employer does not want to employ the employee, or the employee does not want to work for the employer, you cannot by order of the court satisfactorily make them do what one of them does not want to do.

Although the court is unable to order specific performance, but as long as the contract of employment is still in being (because the repudiation by the employer has not been accepted by the servant), the court could under s 55 of the Act grant an injunction to enforce the performance of an express or implied negative undertaking by the employer. However, as I have pointed out earlier, this right to apply for this type of injunction is subject to the proviso in the section which is that the applicant himself does not fail to perform his obligations under the contract. Provided that the servant has not failed to perform the contract so far as it is binding on him (if not prevented from doing so by the employer), even though specific performance is not possible, he could apply for an injunction to secure the performance of an express or implied negative undertaking by the employer in the contract of employment.

Usually, in this type of situation, the employer would not allow the servant to return to work, which in such event, 'the servant cannot sue in debt under the contract for remuneration in respect of any period after the wrongful dismissal, because the right to receive remuneration and the obligation to render services are mutually interdependent': see Buckley LJ in *Gunton* v *Richmond Borough Council*,[3] at p 729-730. However, if the employer relents (which is unlikely), the servant must return to work and continue with his employment, otherwise, the contract would determine. But 'it is very rarely that there can be any expectation that the master will relent and take the servant back into his service under the contract.': Buckley LJ in the same case, at p 729. I have already pointed out early in this judgment that termination of the contract occurs not on the date when the repudiatory act is done, but 'from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of contract.': Bowen LJ in the *Boston Deep Sea Fishing* case,[5] at p 365.

Until the contract is determined by acceptance, the wrongfully dismissed servant would not be entitled to damages for wrongful dismissal. 'If, however, a dismissed servant sues for damages for wrongful dismissal, he must by so doing accept the master's repudiation of the contract.': Buckley LJ in the *Gunton* case,[3] at p 728. Unless the contract is determined by acceptance, the wrongfully dismissed servant would not be entitled to remuneration in respect of any period after the wrongful dismissal if he was not given work or was not allowed to return to work by the employer. 'So, as was recognized in the *Decro-Wall* case [1971] 1 WLR 361 and in *Ivory* v *Palmer* [1975] ICR 340, a wrongfully dismissed servant really has, in the absence of special circumstances, no option but to accept the master's repudiation of the contract.': Buckley LJ in the *Gunton* case,[3] at p 730. But, on the other hand, if the contract is *not* determined by acceptance, the wrongfully dismissed servant would be entitled to an injunction to enforce the performance by the employer of any express or implied negative undertaking in the contract of employment. In other words, the wrongfully dismissed servant cannot eat his cake and also have it.

In the instant case, the removal from office of the plaintiff as chairman of the company and the suspension of his executive powers did not put an immediate end to the contract of service. This operates as a repudiation of the contract by the defendant company. It will result in the determination of the contract only when the repudiation is accepted by the plaintiff. The repudiation has not been accepted by the plaintiff. The contract of employment is still in force.

Although the contract has not been discharged and therefore is still continuing because the repudiation has not been accepted by the plaintiff, but because it is a contract of personal service, the plaintiff is not entitled to a decree of specific performance to compel the defendant company to employ him as the executive chairman and managing director of the company.

Even though specific performance is not possible, the plaintiff is not prevented from applying for an injunction to enforce performance of the express or implied negative undertaking in the agreement. The plaintiff has performed the contract so far as it is binding on him. The defendant company's positive undertaking to employ the plaintiff as its executive chairman and managing director until 31 December 1991 cannot be enforced by specific performance, but as long as the contract is still in being (as the repudiation has not been accepted), an injunction could be granted against the defendant company to perform any express or implied negative undertaking or agreement by the defendant company.

I find that there is on the part of the defendant company an implied negative agreement not to appoint someone else as chairman until the expiration of the plaintiff's period of employment on 31 December 1991.

Lindley LJ, in *Whitwood Chemical Co* v *Hardman*[18] at p 426, has said:

> Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that

which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on ad infinitum;...*

*[Of course, Lindley LJ also went on to say,

... but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will.

*Whitwood Chemical Co* v *Hardman*[18] did not go that length. In fact both judges (Lindley and Kay LJJ) held that in cases arising out of personal service contracts, an injunction will only be issued if there is an express negative stipulation in the contract. At English common law, the courts appear to have adopted this narrow view. Fortunately, in this country, s 55 of the Act does not adopt such a narrow view.]

The defendant company has agreed to employ the plaintiff as its executive chairman and managing director until 31 December 1991. The implied negative agreement is that the defendant company will not employ someone else as its chairman or managing director until the expiry of the plaintiff's period of employment. The court is powerless to force the defendant company to employ the plaintiff as its executive chairman or managing director if the defendant company did not wish to employ him as such. But the court can grant an injunction to enforce performance of the implied negative agreement not to employ someone else as the defendant company's chairman or managing director. I have on 5 October 1989, granted such an injunction restraining the second defendant from acting as chairman of the defendant company and I do not see any reason why this enjoiner should not continue to remain in force.

The positive agreement by the defendant company to employ the plaintiff as its executive chairman and managing director cannot be enforced by specific performance or injunction: see s 20(1)(b) and s 54(f) of the Act. As such, I find that there is, therefore, no justification for the injunctions, which concern the plaintiff remaining in office as executive chairman and managing director and the exercise by the plaintiff of the powers and duties of the holder of such office, to continue to remain in force. I therefore allow the application to discharge these two injunctions.

In the result, only the first injunction remains, namely, the injunction which restrains the second defendant from exercising the powers and duties of the office of chairman of the first defendant company.

*Order accordingly.*

Solicitors: *KS Narayanan & Associates; PS Ranjan & Co.*

Reported by *Yap Shao Sin*